Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1995

WESTERN RADIO SERVICES COMPANY, INC.

Petitioner,

vs.

DAN GLICKMAN, et al.

Respondents.

On petition for writ of certiorari to the United States Court of Appeals of the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

NEPA

Under section 10 of the Administrative Procedures Act of 1946 (APA), § 702, 5 U.S.C. §§ 551 *et seq.* (1970), and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et seq., "any person . . . adversely affected or aggrieved" by an agency decision subject to NEPA Act may seek judicial review of that decision in a federal court. The questions presented are:

> Whether electromagnetic interference at a federal electronic telecommunications site is a "purely economic impact" or a direct environmental impact within the meaning of NEPA.
>
> Whether a corporate commercial telecommunications permittee using a shared federal electronic site subject to electromagnetic pollution is within the zone of interests protected or regulated by NEPA.
>
> Whether prudential standing analysis under NEPA requires a showing that the primary interest of a plaintiff is not "economic" where the economic harm is the result of a direct environmental impact within the scope of the Act.

PARTIES

The petitioner is Western Radio Services, Inc., an Oregon corporation wholly-owned by Richard Oberdorfer, its chief executive officer.

The federal respondents, in their official capacity only, are: Dan Glickman (replacing Michael Espy), Secretary, U.S. Department of Agriculture; Jack Ward Thomas, Chief, U.S. Forest Service; John Lowe, Regional Forester, Richard A. Ferraro, Deputy Regional Forester; Tom Schmidt, Forest Supervisor; Byron Cheney, District Ranger. The private respondent is Slater Communications and Electronics, Inc., a privately-held Oregon corporation.

Neither Petitioner nor the private respondent has any parent companies or nonwholly-owned subsidiaries.

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Petitioner Western Radio Services Company, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit (App 1- 16) is reported as *Western Radio Services v. Espy,* 79 F.3d 896 (9th Cir. 1996). The decision of the United States District Court (App 17-29) is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed and entered on March 18, 1996. No petition for rehearing was filed. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(a).

APPLICABLE FEDERAL LAWS

Section 10(a) of the Administrative Procedures Act states:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . ." 5 U.S.C. 702(a)

Section 2 (42 U.S.C 4321) of the National Environmental Policy Act, "Purpose," states:

> "The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; . . ."

Section 101 (42 U.S.C 4331) of the National Environmental Policy Act, "Declaration of National Environmental Policy," states:

> "(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government . . . to use all practical means . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfil the social, economic, and other requirements of present

and future generations of Americans.

"(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, . . . to impr(/e and coordinate Federal plans, functions, programs, and resources to the end that the Nation may---

"(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

"(2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

"(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

"(4) . . . .

"(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

> "(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources."

Section 102 (42 U.S.C 4332) of the National Environmental Policy Act, "Declaration of National Environmental Policy," states:

> "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act . . ."

STATEMENT OF THE CASE

This case is appropriate for the granting of certiorari for three reasons:

First, the decision of the Ninth Circuit concerning the application of prudential standing "zone of interests" tests to actions brought under the National Environmental Policy Act (42 U.S.C. 4231 *et seq.*) is in conflict with the decisions of other circuits on the same issue, i.e., whether a plaintiff's interest in enforcement of a NEPA claim must be primarily "environmental" rather than"economic" This issue is especially timely because this Court has pending before it a case involving substantially the same issue under the Endangered Species Act (ESA). See *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995), cert granted, 116 U.S. 915, 517 S. Ct. ___, 134 L.Ed.2d 469 (March

25, 1996). The Court's analsyis of economic standing under NEPA should stay current with its analysis of economic standing under the ESA because the two statutes are frequently litigated in tandem. Concurrent consideration will enable the Court to provide timely guidance and to and to fully consider the broader implications of its holdings.[1]

Second, this case raises an important issue of law concerning the scope of interests protected or regulated by the National Environmental Policy Act., i.e., whether NEPA protects the economic as well as the environmental interests of

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[1] The questions presented by the petition for certioriari in *Bennett* under the citizen suit provision of the Endangered Species Act of 1973, 16 U.S.C. 1540(g)(1), are:

> "Whether the broad standing mandated by Congress in the citizen suit provision of the Endangered Species Act is subject to a zone of interest test as a further, judicially-imposed prudential rule of standing;
>
> "If standing to sue under the Endangered Species Act is subject to prudential limitations, whether those limitations permit only environmental plaintiffs to challenge government conduct alleged to violate the terms of the Act or whether the claims of economic injury raised by public water suppliers and wter users are also within the zone of interests protected or regulated by the Act." *Bennett, supra, Pet. for Cert.*, p. i

claimants subject to environmental harms. This is an important procedural issue which has not been previously addressed by the Court.

Third, this case raises an important issue of law concerning whether pollution of the airwaves by stray electromagnetic emissions constitutes a direct effect on the environment within the meaning of NEPA.

The procedural background is as follows:

In 1978 Respondent Forest Service granted Petitioner a special use permit to operate a "mobile radio-commercial communications" facility at the Gray Butte Electronics Site within the Ochoco National Forest in eastern Oregon. ER 29-32; AR 17-20. Over the years, Respondent Forest Service has issued numerous additional special use permits for the operation of various electronic transmittal units at the Gray Butte site. The result is a crowded electronic site at top of the peak. ER at 38; AR at 0026 (February 26, 1980, letter from Forest Supervisor stating that "Gray Butte is fast becoming a high density electronic site.")

Petitioner has continuously expressed to the agency its concern with the potential for these operations to interfere with Petitioner's operation. ER 33-37; AR 21-25.

In 1981 the Forest Service adopted a new Gray Butte Electronic Site Management Plan to amend a plan that had been initially adopted in 1973. AR 86 (1981 Gray Butte Electronic

Site Management Plan) The new plan stated: "Use of the site has increased steadily during recent years. In May, 1980, it was determined . . . that the current plan was not adequate for projected use . . .." ER 40 (excerpts from site plan).

The 1981 site plan was preceded by an environmental assessment (EA) which incorporated the "assumption" that uses at Gray Butte should be limited "to mobile radio communications or other compatible users." ER 39; AR 49. This restriction to mobile radio communications or other compatible users recognized that other uses such as continuous broadcast operations, had the potential to interfere with mobile radio communications if placed at the same site. The plan's restriction was consistent with the Forest Service Manual (FSM), which at the time required that "high power broadcast stations, FM, television, radar, should be separated [from mobile radio communications] by one mile if possible." ER 337. The site plan was subsequently amended from time to time, but interference problems continued.

On November 19, 1992, the Supervisor of the Ochoco National Forest issued a Notice of Decision (1) adopted a supplemental Environmental Assessment (EA); (2) making a Finding of No Significant Impact; and (3) amending the site plan to authorize the issuance of a new special use permit to Respondent Slater Communications based upon the amended site plan, but inconsistent with the prior site plan. The November 19, 1992, package of decisions omitted equipment standards, separation requirements, and other safeguards that had been requested by Petitioner and other users. ER 256; AR 1094. Petitioner appealed the decisions on January 14, 1993. ER 257-280; AR 1115 -1138. On May 4, 1993, the Regional Forester affirmed the Supervisor's decisions. ER 281-283; AR

Petitioner then filed this action in the district court, under 5 U.S.C. sec. 702 and 28 U.S.C. sec. 1331. Petitioner alleged, *inter alia*, that the agency had violated the National Environmental Policy Act and implementing regulations ((42 U.S.C. §§ 4321 *et. seq.* and 40 C.F.R. § 1508) by failing

> "to support their actions with an adequate consideration of reasonable alternatives and an adequate determination, record, and decision document establishing that those actions will not, separately, or collectively, constitute a major federal action having a significant impact on the human environment." Complaint paragraph. 28. App 48.

Following submission of the record and discovery, both parties moved for summary judgment based upon the record, depositions, and affidavits. The District Court ruled against Petitioner on the merits of a claim under the National Forest Management Act, and dismissed Petitioner's NEPA claim on the ground that a recent Ninth Circuit decision, *Nevada Land Action Ass'n v. U.S. Forest Services,* 8 F.3d 713 (9th Cir. 1993) "categorically" excluded "from NEPA standing those with economic injuries." *Western Radio Services v. Espy*, (DC Or 93-552-MA, May 3, 1994). App 16, 27.

Petitioner appealed to the Ninth Circuit Court of Appeals under 28 U.S.C. Sec. 1291. The Ninth Circuit, reviewing the NEPA standing issue *de novo*, affirmed the dismissal of the NEPA claim on the ground that (a) electronic interference is an "economic" injury and (b) a NEPA plaintiff's injury must be primarily environmental in nature under the prudential standing "zone of interests" test in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). App 13-14.

ARGUMENT

NEPA Standing--Zone of Interests: Businesses threatened with adverse economic effects of direct environmental impacts are within the Zone of Interests Protected by NEPA.

1. **The Ninth Circuit Court of Appeals erred in applying rules of prudential standing to bar all potential plaintiffs under NEPA whose "primary" interest is "economic" rather than 'environmental."**

Almost a quarter-century ago, this Court announced in the landmark *United States v. Students Challenging Regulatory Agency Procedures (SCRAP I)*, 412 U.S. 669, 686, fn. 12, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973) that standing under NEPA is "not confined to those who show economic harm. . ." (citing *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). The question presented here is whether standing under NEPA is confined to those who show noneconomic harm. That question was specifically reserved in SCRAP I, where this Court found it

> ". . . unnecessary to consider the various allegations of economic harm on which the appellees also relied in their pleadings and which the Government contends are outside the purposes of NEPA." 412 U.S. 686, fn. 13.

The government has renewed that contention in this case, and it has prevailed. This Court has never addressed the question reserved in Sierra Club and *SCRAP I*: Does economic harm to a plaintiff resulting from environmental harm bring that

plaintiff within the zone of interests protected by the National Environmental Policy Act?

This question grows more pressing as the nation's population and economy expand. Can only the hikers and the birdwatchers take the field on behalf of the environment? Are only noneconomic interests protected by NEPA? Will an entire category of potentially powerful allies in the battle for environmental quality be sidelined or driven into opposing ranks by a narrow reading of the broad purpose and policy statements posted by Congress on the front door of the nation's primary environmental protection statute?

The Ninth Circuit has ruled in this case that

> "Because NEPA suits are reviewed under the Administrative Procedure Act, . . . a plaintiff alleging a NEPA claim must also 'assert an interest arguably within the zone of interests to be protected or regulated by NEPA.' *Nevada Land Action*, 8 F.3d at 715-16 . . . NEPA's purpose is 'to protect the environment, not the economic interests of those adversely affected by agency decisions. Therefore, *a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA.' Id.* at 716 [citations omitted and emphasis added by court] App 15.

Applying this analysis to the case at hand, the Ninth Circuit ruled as follows:

> "Western's only complaint is that the Service's permit will cause economically

> harmful interference. No one alleges that Slater's new facility 'will have a primary impact on the natural environment.' [Quoting from *Port of Astoria v. Hodel, 595 F.2d 467, 475 (9th Cir. 1979)*]. . . . Western's sole complaint was alleged interference, which we have held is purely economic." [citing *Hodel.*] Western's injury is therefore not one that NEPA aims to redress." App 15.

In this case, Petitioner Western Radio has rested its claim to standing under NEPA primarily upon its economic interest in avoiding the adverse environmental effects of stray electromagnetic emissions. The likely economic impact upon Petitioner is the impairment of Petitioner's ability to provide high-quality telecommunications facilities to users of the telecommunications site which it operates under a Forest Service permit on the Gray Butte electronic site.

Petitioner is in the position of most corporate businesses affected by environmental pollution. Corporations don't drink water, breathe air, or listen to music. They use water, air, and the airwaves in the course of making, advertising, and selling soup, computer chips, television shows, and almost everything else humans produce, sell, use, and enjoy. Their primary interest in an unpolluted environment is undoubtedly economic. The Ninth Circuit would deny them standing.

Under the Ninth Circuit Court's decision in this case, ABC, CBS, NPR, and U.S. West would have no standing under NEPA to challenge the licensing of a telecommunications facility generating stray electromagnetic energy that effectively jammed their satellite communications systems. Their "primary" interest would be "economic," not "environmental."

Under NEPA, people, not trees, have standing. Whatever may have happened to western civilization's anthropocentrism during the enlightened 1980's, NEPA's purposes are explicitly instrumental and anthropocentric. Congress acted to protect the interests of people, including their economic interests, in a clean and healthy environment. NEPA explicitly recognizes a wide range of human interests in the protection of the environment. To paraphrase this Court's words in SCRAP I, NEPA recognizes that economic and productive well-being, like aesthetic and environmental well-being, are important ingredients of the quality of life in our society.

On many issues, including the availability of judicial review to any third-party plaintiff, it is true that "the legislative history [of NEPA] is remarkably uninformative considering the long history of the act." 2 Grad, *Treatise on Environmental Law*, § 9.01(h) (1995). On the other hand, the words of the Act itself are the best evidence of legislative intent, and NEPA is both expansive and explicit on the range of interests it is supposed to serve. The statements of purpose and policy in Sections 101 and 102, set forth verbatim above, repeatedly emphasize the symbiotic relationship between a healthy environment and a healthy economy, between conservation of resources, and economic productivity. The statute itself recognizes, in more prosaic terms, that "Neither nature nor people alone can produce human sustenance, but only the two together, culturally wedded." Wendell Berry, *The Unsettling of America*, (Sierra Club Books: 1977), p. 9.

The "sweeping policy goals announced in § 101 of NEPA" (*Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)) stand in marked and significant contrast with the narrow, wildlife-

centered focus of the Endangered Species Act, 87 Stat. 884, as amended, 16 U.S.C. 1531 *et seq.* *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 558, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). NEPA's focus is on the "human environment." Its purpose is to safeguard the full range of economic and noneconomic benefits that accrue from a healthy environment. It recognizes that both Western Radio and recreational users of Gray Butte have a common interest in assuring that the Forest Service adequately consider the potential environmental impacts of decisions affecting the peak and its surrounding area.

2. The Ninth Circuit's ruling is in conflict with the rulings of other circuits.

The Ninth Circuit's ruling on economic standing is in conflict with the rulings of other circuits. Specifically, the District of Columbia Circuit has ruled that

> ". . . courts should deny standing to businesses asserting NEPA claims only when 'the companies are motivated solely by protection of their own pecuniary interests *and* . . . the public interest aspect is so infinitesimal that it ought to be disregarded altogether." *National Helium Corp. v. Morton*, 455 F.2d 650, 655 (10th Cir. 1971).

In *National Helium*, the plaintiff company had contracted to supply helium to the government. Helium is a by-product of natural gas production. If it is not captured, it is lost into the atmosphere. When the government cancelled the contract, the company sued under NEPA on the ground that the cancellation would result in the loss of natural resources. The direct environmental harm was to a resource in which the

plaintiff had an economic stake. To call it merely "economic" harm would be to ignore the source of that economic harm in a loss clearly within the scope of the National Environmental Policy Act.

As the Ninth Circuit's opinion acknowledges with some understatement, its ruling is also in "tension" with the Ninth Circuit's own earlier ruling in *Port of Astoria v. Hodel, (1979)*, 595 F.2d 467, 476 (1976). In *Hodel*, citing *National Helium*, it had granted standing to a broadcasting company worried about interference from a proposed power line because the broadcaster's "economic injuries [were] . . . causally related to an act that lies within NEPA's embrace." The distinction drawn by the court between the two cases was that the earlier case involved a "primary" environmental impact, namely, the construction of an aluminum reduction plant that would be made possible by the new transmission lines. 595 F.2d at 476. Other "individual" plaintiffs living in the affected area and a "Concerned Citizens" group had alleged these "ecological and environmental injuries resulting from the construction and operation of the Alumax plant." *Id.*

The "primary" versus "secondary" distinction is unexplained in these cases. It is not the same as "direct" versus "indirect," a concept recognized in this Court's NEPA standing jurisprudence. *See, e.g., Metropolitan Edison v. People Against Nuclear Energy,* 460 U.S. 766, 203 S. Ct. 556, 75 L.Ed.2d 534, 543 (1983)("The direct effects on the environment of this action include release of low-level radiation, increased fog. . ., and the release of warm water into the Susquehanna River.") Rather, it seems to involve some sort of conclusion about the merits of the claim that an environmental impact is "major" or "significant." Whatever it is, it has no basis in NEPA, in Article III of the Constitution, or in the case law of this Court.

3. **The Ninth Circuit's decision categorically excludes from the scope of NEPA a major physical environmental pollutant.**

The Ninth Circuit's decision is uniquely preclusive because it conflates two kinds of harm--the interference itself, and the economic loss resulting from impairment of that part of the environment essential to Plaintiff's economic well-being.

Interference, of course, is not "purely economic." It is not economic at all. It is a physical phenomenon. It is direct environmental harm. It exists in the real world. It is detectable and measurable by instruments (and when amplified, by the senses) in the same way that microbes, temperature changes, and particulates are. Students learn about interference in high school physics, not in college economics classes. Interference is electromagnetic pollution of the space through which it travels. Stray electromagnetic emissions pollute the human environment just as surely, physically, and directly as do heat, chemicals, particulates, and other kinds of pollutants affecting everything from deep sea creatures to space navigation and satellite communications.

If such harm is categorized as "economic," and therefore not within the scope of NEPA, then it makes no difference whether the interference is major or minor, hypothetical or existing. The Ninth Circuit's classification scheme eliminates the need for such assessment, even though the analysis required involves physics and technicians rather than psychology and psychiatrists.

Even the plaintiffs in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 160 U.S. 766, 103 S.Ct. 556, 75 L.Ed.2d 534 (1983) had standing; this Court recognized that

their claim involved a direct physical impact on the environment----radioactive emissions. On the merits, this Court found that the agency had no obligation to address the attenuated, unquantifiable, and subjective potential harm alleged, which was "psychological damage" resulting from plaintiffs' perception of the increased "risk of a nuclear accident." *Id.* 103 S.Ct. at 560.

4. Respondent's own handbooks, manuals, and directives acknowledge the existence of the environmental harm in question.

In this case, there is no question that the environmental harm exists and will continue to exist unless the kinds of measures recognized as necessary by the Forest Service itself are taken. Electromagnetic interference with two-way communications facilities by continuous broadcast facilities is recognized as a fact in the agency's own manual and handbook, as well as in the environmental assessment and site plan.

The U.S. Forest Service has officially recognized that: (1) interference requires prophylactic rather than solely remedial measures; and (2) that the problem is inherent at compact electronic sites involving both two-way and continuous broadcast facilities. Forest Service Manual Chapter 2728.6, special use applications **must** be denied if "the use is not compatible with current uses." Chapter 2728.5 recognizes that interference problems are inherent on such sites and that preventative measures such as separation of incompatible uses, equipment standards, and the like are necessary:

> "The compatibility of communications uses with one another is basically a function of frequency relationships, geographic separation, the amount

> and period of power emission, and equipment design characteristics. Problems may be mitigated by judicious use of frequency assignments by the responsible agency, by locating incompatible uses on different site, or by the addition of special equipment, i.e. by adding filters. Site designation and the site plan will identify the intended use of the site. Uses which are considered incompatible will not be authorized on the site. Interim Directive #68/90-3, FSM Chapter 2728.5.

The Forest Service Handbook acknowledges that

> "[t]he inherent interference problems between broadcast uses and other uses often make resolution of interference problems impractical." FSH 2709.11-93-2, chapter 48.8(b); ER at 292; AR at 1161.

The 1989 Gray Butte Electronic Site Management Plan ("Site Plan"), as amended November 19, 1993, includes the following requirements implementing the consistency and compatibility standards of § 251 and the Forest Service Manual:

> "2. Minimize interference potential through facility designs, location, spacing, capacity, zoning, and equipment standards."

The Gray Butte Electronic Site was designated by the last Environmental Assessment completed for the Site in 1980 for mobile two-way radio and other compatible uses. The Forest Service Handbook 2709.11, Chapter 48, identifies continuous broadcast as non-compatible with mobile two-way

radio, and further requires the separation of non-compatible uses by one mile. No Regional criteria have been established that allow the separation between continuous broadcast uses and mobile two-way radio uses to be permitted at less than the agency's national one-mile horizontal separation standard. That requirement has been in effect in the Forest Service Manual since 1978.

The Forest Service Manual (Interim Directive #68/90-3) lists several conditions which must be met before special use authorizations will be issued at communications sites:

> "Authorizations will not be issued until: . . . (c) coordination with the current holders on the site, including a 30-day comment period concerning the application; (d) acceptable design measures or other satisfactory resolution of potential incompatibility have been agreed to by the applicant and the existing holders on the site, including the Forest Service, if applicable." Interim Directive #68, FSM 2728.8 (emphasis added); see also 36 C.F.R. § 251.55(b)(3).

As the above passages and the record citations in the margin show, such interference is a problem acknowledged by other users and by the agency itself, as both endemic to such sites and as existing at the specific site in question.[2]

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[2] Affidavit of Leslie Smith, former president of Oregon Radio Frequency Council. ER at 182; AR at 606; App 30. May 14, 1991, G.L. Mobilcomm letter to district ranger, noting serious interference problems at Gray Butte and stating that Mobilcomm was losing customers as a result. ER at 251; AR at 1040; App 40. March 24, 1994, affidavit of Kenneth R. Reiswig, Sr., senior communications

If electromagnetic pollution of the airwaves (interference) is an environmental harm, and if NEPA protects the economic interests of corporations in avoiding such harm, then Petitioner has amply carried its burden of demonstrating that there are genuine issues of material fact sufficient to survive a motion for summary judgment on the issue of its standing to challenge Respondent's environmental assessment and finding of no significant impact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed. 2d 351 (1992).

Petitioner is a current and continuing licensee sharing the limited public resource that has been impaired by the pollutant. The responsible agency has officially recognized both (1) the inevitability of the environmental harm in the absence of appropriate preventative safeguards, and (2) the availability of such safeguards. Other users and experts have provided affidavits attesting to both the environmental and the economic harm. The interference is likely to continue and perhaps worsen in the absence of preventative measures. On the merits, Petitioner contends that such measures would be necessary to support a finding of no significant impact (FONSI). Those measures were not adopted.

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technician for Pacific Power and Light Co., describing interference problems at Gray Butte and stating that "Our new method of resolving the interference to Pacific Power and Light Co. involves leaving the site." ER 465, App 40.

5. Petitioner has demonstrated injury in fact and redressability.

Instead of preparing an EIS or a supportable FONSI, Respondent has simply made an unsupported determination, contrary to its own official acknowledgments, that no such measures are necessary and that no EIS is required. The Ninth Circuit, reviewing the District Court's decision on standing *de novo*, has concurred on the ground that, because "interference" is an "economic injury," Plaintiff's "injury is therefore not one that NEPA aims to address." App 15. The Court correctly summarizes the Article III elements of standing as follows:

> "In *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992), the Supreme Court delineated the three minimum constitutional requirements to have standing to challenge an alleged injury. First, the plaintiff must allege an actual or imminent invasion of a concrete and legally-protected interest. Second, there must be a causal connection between the injury and the alleged harmful conduct. Third, it must be likely that a favorable decision will redress the injury. *Id.* at 560-61." App 14.

Unfortunately, the Ninth Circuit's amplifications of the *Lujan* tests are clouded by the leakage of prudential standing considerations into the third element, converting it to a kind of zone of interests clone by requiring that the "primary" harm "caused" by the federal action be "environmental." The Ninth Circuit's adds more turbidity by conceptually collapsing an economically important category of direct physical harm--stray electromagnetic emissions affecting the broadcast spectrum--and the resulting economic harm.

The result is a muddy legal puddle, opaque and treacherous, in the middle of the information superhighway.

A proper analysis of redressability starts with the understanding that interference is a physical harm to the environment and that the subject of the litigation is more than a single facility permit. The issue raised by Petitioner is whether Respondent's amendment of its site plan should include new anti-pollution safeguards applicable to **all** electronic facilities and users on the site. Respondent's failure to heed its own institutional wisdom, as confirmed by user experience at Gray Butte, will be redressed if Respondent is required to adopt measures sufficient to support its FONSI. Respondent's failure to take the action required by NEPA in the absence of such measures will be redressed if Respondent is required to prepare an Environmental Impact Statement.

Plaintiff has amply demonstrated that the harms alleged exist, whatever their specific source, that they involve electromagnetic pollution of the human environment, and that Plaintiff's economic well-being is dependent upon the absence or at least the minimization of such pollution. Affidavit of Richard Oberdorfer, ER 312-19, APP 34.

NEPA does not mandate substantive outcomes once an EIS has been performed. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S.222, 100 S. Ct. 497, 62 L.Ed.2d 433 (1980); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551, 558, 55 L.Ed.2d 460, 98 S.Ct. 1197 (1978). However, the agency has not performed an EIS, and it is has not adopted the preventative measures recognized by its own manuals and handbooks as necessary to support a Finding of No Significant Impact. Those measures would be substantive and would redress Plaintiff's substantive injury. In the absence of

such measures, an EIS would be necessary, and the preparation and adoption of an EIS would then redress Plaintiff's procedural injury. *Strycker, supra.*

CONCLUSION

The Court is asked to picture a once-pristine pool fed by a mineral spring, deep in a national forest. Because of its special qualities, the spring has been used for years as a source of water for several small bottlers operating under permits from the United States Forest Service, which administers the permits in conformance with its adopted site plan. Over the years, the bottlers have had trouble with turbidity, which has made the spring water less clear and the bottled water less marketable. The Forest Service has recognized, in its official handbooks, manuals, and directives, that certain equipment, practices, and locational factors contribute to the turbidity. Detection of specific turbidity sources is difficult, but that prevention through appropriate siting, spacing, use, and equipment standards is feasible.

One of the bottlers, who perhaps isn't as dependent as others on maintaining the purity of the pool, seeks an amendment to the site plan so that it can obtain a new permit which is not consistent with the old site plan. Another bottler, which has suffered losses because of the turbidity problem, asserts that the site plan amendment should incorporate more effective safeguards and that the permit should be issued only in accordance with those new safeguards. The Forest Service declines, asserting only that the existing ineffective system of post-hoc complaint-driven remediation will continue.

The second bottler, alleging that the turbidity problem is damaging its business, brings a NEPA challenge the site plan

amendment, the relicensing under the amendment, and the agency's finding of no significant impact accompanying the two decisions.

The question posed by the hypothetical needs an authoritative answer: Did Congress intend to protect the economic interests of that bottler in the prevention of pollution of natural resources of economic value to at least the same extent that this Court has determined Congress intended to protect the aesthetic interests of the plaintiffs in *SCRAP, supra?*.

The protection of three "pools," each one a "natural resource," and each one a part of the "human environment," is at issue in this case:

The first pool is the tiny peak of Gray Butte, crowded with public and commercial users, recognized as a special resource by the Ochoco National Forest Plan and the Gray Butte Electronic Site Plan.

The second pool is the large area of central Oregon served by users and consumers of the telecommunications services provided from the peak of Gray Butte.

The third pool is the entire airspace so essential to modern telecommunications. That space is is the limpid lens through which our species sees with its electronic eyes. It is the silence through which we hear with our electronic ears.

All three pools are increasingly subject to a wide range of potentially damaging contaminants, including electrical interference. Those affected by electromagnetic pollution range from homeowners, hikers, small business owners, and

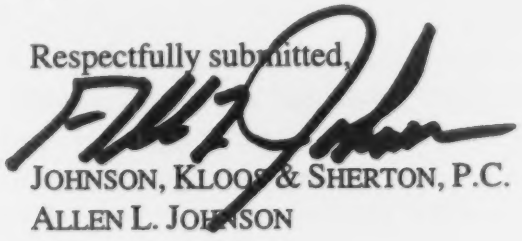
firefighters to international corporations and the military. If all such harm is economic, and if economic harm alone is not a basis for standing to protect that pool, then a large class of users is excluded from the protection of the statute.

In the Ninth Circuit, the broad and inclusive purposes of Congress have been narrowed and distorted to make NEPA a tool for only a segment of those for whose benefit it was enacted.

What is needed now, almost a quarter-century after *SCRAP*, is an act of timely judicial prevention and remediation: Prevention is needed in the form of a decision of this Court that removes the legal turbidity clouding the pool of NEPA standing jurisprudence. Cure is needed in the form of an order remanding the decision below for serious consideration on the merits by a court with jurisdiction to address the merits of Petitioner's NEPA claim.

DATED: June 17, 1996.

Respectfully submitted,



JOHNSON, KLOOS & SHERTON, P.C.
ALLEN L. JOHNSON

Attorney of Record for Petitioner
Western Radio Services, Inc.

APPENDIX A -- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF OREGON CIRCUIT DATED MARCH 18, 1996

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF OREGON

No. 94-35605

WESTERN RADIO SERVICES COMPANY, INC., Oregon corporation
APPELLANT

v.

MICHAEL ESPY et al,
APPELLEES

Appeal from the United States District Court
for the District of Oregon
Malcolm F. Marsh, District Judge, Presiding

Argued and Submitted
October 17, 1995 - Portland, Oregon

Filed March 18, 1996

Before: J. Clifford Wallace, Dorothy W. Nelson, and Melvin Brunetti, Circuit Judges.

Opinion by Judge Wallace

SUMMARY

Administrative Law/Natural Resources and Energy/ Administrative Law

The court of appeals affirmed district court judgments. The court held that it had no authority to bind the United States Forest Service (Service) to guidelines in the Service's manual or handbook, and the Service did not abuse its discretion in issuing a special use permit.

The Gray Butte Electronics Site is located in a national forest. Pursuant to special use permits issued by the Service, appellee Slater Communications & Electronics, Inc. and appellant Western Radio Services Company, Inc. operate and maintain mobile radio communications facilities at Gray Butte.

The Service issued a special use permit to Slater to construct, maintain, and rent a new building and tower on Gray Butte. Western appealed from the Service's decision to issue a permit, complaining about possible interference problems at the site. Western settled with the Service.

The Service adopted a new site plan and issued Slater a new building permit. The new site plan permitted only "compatible uses" and required equipment or towers that cause interference to be adjusted or removed. Western complained of potential interference and appealed from the Service's reissuance of a permit to Slater, but the Forest Supervisor denied the appeal. The Regional Forester refused to reverse the Service's decision to issue a permit. The Service conducted meetings with users, and Gray Butte site users agreed on a location for Slater's new facility. The Forest Supervisor issued a Decision Notice and finding of no significant impact, stating an intention to issue Slater a special use permit to construct a building and tower. The Regional

Forester affirmed the decision to issue a permit, and the Chief of the Forest Service declined discretionary review.

Western sued in the district court, alleging that the Service's decision to issue Slater a building permit violated the National Environmental Policy Act (NEPA). Western also claimed that the decision violated the National Forest Management Act because the Service allegedly did not comply with applicable regulations, including a Forest Service Manual and Forest Service Handbook. The district court rejected Western's claims and granted summary judgments for the Service and Slater. The court held that the Service did not abuse its discretion in issuing a special use permit to Slater, and Western did not have standing to bring a NEPA claim. Western appealed.

[1] The district court properly retained jurisdiction. Western stated a claim against the Service for issuing a special use permit to Slater. The Federal Communications Commission did not have the authority to redress Western's complaints about the permit's issuance.

[2] The Manual and Handbook were not substantive in nature, [3] they were not promulgated in accordance with the Administrative Procedure Act's procedural requirements, [4] and they were not promulgated pursuant to an independent congressional authority. [5] Thus, the Manual and Handbook did not have the independent force and effect of law. [6] Moreover, even assuming that the Manual and Handbook were incorporated into the Secretary of the Department of Agriculture's regulations, the Secretary could not bind the Service to a Manual or Handbook that was neither promulgated pursuant to congressional procedures nor contemplated in a statute.

[7] A regulation specified that the Service could consider whether a special use permit would be compatible with existing uses. In this case, the Service made a compatibility assessment, and its decision to issue Slater a building permit was not arbitrary or capricious. The permit authorized Slater to construct a new facility and raze its old one; it did not authorize any new uses that could cause interference; moreover, the permit provided that if the equipment or tower's installation caused interference, Slater would be required to make adjustments. The Service considered compatibility of uses and did not abuse its discretion in issuing a permit to Slater.

[8] Western's only complaint was that the Service's permit would cause economically harmful interference. Western's injury, therefore, was not one that NEPA aimed to redress.

COUNSEL

Michael D. Axline, Johnson & Kloos, Eugene, Oregon, for the plaintiff-appellant.

Joan M. Pepin, United States Department of Justice, Washington, D.C., for the federal defendants-appellees.

Rose M. Z. Freeby, Evans, Freeby & Jennings, Salem, Oregon, for defendant-appellee Slater Communications.

OPINION

WALLACE, Circuit Judge:

Western Radio Services Co., Inc. (Western) appeals from the district court's summary judgments for the United States

Forest Service (Service) and Slater Communications & Electronics, Inc. (Slater.). The district court held that the Service did not abuse its discretion in issuing a special use permit to Slater and that Western did not have standing to bring a claim under the National Environmental Policy Act (NEPA). The district court had jurisdiction under 5 U.S.C. § 702 and 28 U.S.C. § 1331. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.

I.

The Gray Butte Electronics Site is located on the Crooked River National Grassland in the Ochoco National Forest in Oregon. The Service and the Department of Agriculture manage the site and have authority to issue special use permits for land under their control; however, permits for uses coming within Federal communications Commission (Commission) jurisdiction are contingent upon Commission authorization and licensing. Pursuant to special use permits issued by the Service, Slater and Western operate and maintain mobile radio communications facilities at Gray Butte. Slater and Western originally received permits in 1976 and 1978, respectively.

On December 10, 1986, the Service issued a special use permit to Slater to construct, maintain, and rent a new building and tower on Gray Butte. Western appealed from the Service's decision to issue a permit, complaining that the new building would exacerbate interference problems at the site and that the permit did not conform to the applicable site plan. Eventually, Western settled with the Service and the Service agreed to update the Gray Butte Site Plan. In 1989, the Service adopted a new site plan and in 1990, it issued Slater a new building permit. The 1989 Site Plan permits only "compatible uses of the site" and requires any equipment or tower that causes interference to be adjusted or removed.

Again, Western complained of potential interference and appealed from the Service's reissuance of a permit to Slater. The Forest Supervisor denied the appeal.

On appeal from the Forest Supervisor's denial, the Regional Forester refused to reverse the Service's decision to issue a permit. However, the Regional Forester directed the Service either to document its efforts to resolve Western's complaints about current or potential interference or to hold meetings with site users to address potential incompatibility problems. The Service conducted several meetings with users, and the Regional Forester determined that the Service had complied with the earlier decision. Approximately two months after the Regional Forester's approval, Gray Butte site users agreed on an acceptable location for Slater's new facility. Richard Oberdorfer, Western's president, disputes that he ever agreed to this location. The Forest Supervisor issued a Decision Notice and a finding of no significant impact, stating its intention to issue Slater a special use permit to construct a building and tower at the agreed-upon site. Western again appealed to the Regional Forester, who affirmed the decision to issue a special use permit. On May 17, 1993, the Chief of the Forest Service declined discretionary review. The Chief's determination constituted final agency action.

Western then filed this action in the district court, alleging that the Service's decision to issue Slater a building permit violated NEPA. Western also asserted that the decision violated the National Forest Management Act, 16, U.S.C § 497, because the Service allegedly failed to comply with applicable regulations. Western argued that applicable regulations included the Forest Service Manual (Manual) and Forest Service Handbook (Handbook), in addition to the regulations promulgated under 16 U.S.C. § 497 and codified at 36 C.F.R. §§ 251.50 *et seq.* (1995). The district court

rejected Western's claims.

II.

Slater suggests we not address the merits of the appeal. Slater argues that the district court lacked jurisdiction over Western's claims because Western did not exhaust administrative remedies. Slater asserts that Western should have complained to the Commission before filing in the district court.

[1] It is within our discretion to require exhaustion, *Montes v. Thornburgh,* 919 F.2d 531, 537 (9th Cir. 1990), and we will generally require that a plaintiff exhaust all administrative remedies before assuming jurisdiction. *White v. Jacobs Eng'r Group Long Term Disability Benefit Plan,* 896 F.2d 344, 352 (9th Cir. 1989). Here, the district court properly retained jurisdiction. Western's complaint states a claim against the Service for issuing a special use permit to Slater. It was the Service, and not the Commission, that issued the use permit. Although the Commission deals with problems of interference, the Commission does not have the authority to redress Western's complaints about the issuance of the permit. Nor can the Commission redress Western's complaints about the location of Slater's new facility. We will not require Western to complain to the Commission about a Service permit before bringing an action in the district court.

III

We therefore turn to the merits of the appeal. We review a summary judgment de novo. *First Pacific Bank v. Gilleran,* 40 F.3d 1023, 1024 (9th Cir. 1994), *cert. denied,* 116 S. Ct.

55 (1995). This review requires us to determine (1) whether there is a genuine issue of material fact when the evidence is viewed in the light most favorable to the nonmoving party and (2) whether the district court correctly applied the law. *Id.*

When reviewing an administrative agency's decision, we view the case from the same position as the district court. *Nevada Land Action Ass'n v. United States Forest Service,* 8 F.3d 713, 716 (9th Cir. 1993) (*Nevada Land Action*). An agency's decision should be overturned if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); *Idaho Farm Bureau Fed'n v. Babbitt,* 58 F.3d 1392, 1401 (9th Cir. 1995). Review under the arbitrary and capricious standard is narrow and the reviewing court may not substitute its judgment for that of the agency. *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 376 (1989) (*Marsh*). We must determine whether the agency's decision was made after considering the relevant factors and whether the agency made a clear error of judgment. *Id.* at 378. We may reverse the agency's decision as arbitrary or capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the agency, or offered one that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Dioxin/Organochlorine Center v. Clarke,* 57 F.3d 1517, 1521 (9th Cir. 1995).

The Service issues special use permits subject to regulations promulgated by the Secretary of the Department of Agriculture (Secretary). *See* 16 U.S.C. § 497. Generally, the Service's decision to issue or deny a permit is subject to judicial review. *See KOLA, Inc. v. United States,* 882 F.2d 361, 364 (9th cir. 1989) (KOLA). However, we will review an agency's alleged noncompliance with an agency

pronouncement only if that pronouncement actually has the force and effect of law. *United States v. Fifty-Three (53) Eclectus Parrots,* 685 F.2d 1131, 1136 (9th Cir. 1982) (*Fifty-three Parrots).* We will not review allegations of compliance with an agency statement that is not binding on the agency.

Western contends that the Service acted arbitrarily and capriciously by issuing a permit and following a procedure that failed to comply with the Service's regulations, 36 C.F.R. §§ 251.52, 251.54 (1995) and the Service's guidelines in its Manual and Handbook.

The National Forest Management Act authorizes the Secretary to issue regulations "for the purpose of constructing or maintaining buildings, structures, and facilities for industrial or commercial purposes whenever such use is related to or consistent with other uses on the national forests." 16 U.S.C. § 497(c). In 1980, the Service adopted regulations setting forth standards to consider in issuing special use permits. 36 C.F.R. § 251.54 (1995). These regulations have the force and effect of law. *KOLA*, 882 F.2d at 364.

Section 251.54(i) contains various factors that the Service may consider when denying a permit. Section 251.54(i)(1) provides that a Service official may deny issuance of a special use permit if the proposed use "would be inconsistent or incompatible" with other existing forest uses. Also, section 251.52 states: "Special use authorizations. . .shall be in such form and contain such terms, stipulations, conditions, and agreements as may be required by the regulations of the Secretary and the instructions of the Chief."

In addition to these regulations, the Office of the Chief, pursuant to 36 C.F.R. § 200.4 (1995), issued the Manual and Handbook. Western argues that the Service violated various provisions of the Manual and Handbook. It argues that the Manual and Handbook have the independent force and effect

of law and that the Service therefore acted arbitrarily and capriciously in failing to follow them. Western alternatively argues that even if the Manual and Handbook do not have the independent effect of law, sections 251.52 and 251.54 adopt the Manual and Handbook by reference, thereby rendering them binding. If we hold that the provisions in the Manual and Handbook do not have the force and effect of law either independently or by reference, we will not need to review Western's contention that the Service failed to comply with the guidelines contained in either. We therefore turn to the first issue.

A.

To determine whether the Manual and the Handbook have the independent force and effect of law:

> the agency pronouncement must (1) prescribe substantive rules -- *not* interpretive rules, general statements of policy or rules of agency organization, procedure or practice -- and (2) conform to certain procedural requirements. To satisfy the first requirement the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.

Fifty-Three Parrots, 685 F.2d at 1136 (internal quotations and citations omitted); *see also Chrysler Corp. v. Brown.* 441 U.S. 281, 301 (1979) (*Chrysler*).

[2] Neither the Manual nor the Handbook satisfies either

of the requirements in *Fifty-Three Parrots*. First, the Manual and Handbook are not substantive in nature. In *United States v. Doremus,* 888 F.2d 630, 633 n.3 (9th Cir. 1989), *cert. denied,* 498 U.S. 1046 (1991), we explained in dictum that "the Forest Service Manual merely establishes guidelines for the exercise of the Service's prosecutorial discretion; it does not act as a binding limitation on the Service's authority." *See also Stone Forest Industries v. United States,* 973 F.2d 1548, 1551 (Fed. Cir. 1992) (Manual does not have the force and effect of law); *Lumber, Prod. and Indus. Workers Log Scalers Local 2058 v. Unites States,* 580 F. Supp. 279, 283 (D. Or. 1984) (Manual is "basically a large compilation of guidelines. . .[and] not a 'substantive' rule" (internal quotations and citations omitted)). The Manual and Handbook are a series of "[p]rocedures for the conduct of Forest Service activities." 36 C.F.R. § 200.4(b),(c)(1) (1995).

[3] The Manual and Handbook are not promulgated in accordance with the procedural requirements of the Administrative Procedure Act. Neither is published in the Federal Register or the Code of Federal Regulations. *See parker v. United States,* 448 F.2d 793, 797 (10th Cir. 1971), *cert. denied,* 405 U.S. 989 (1972). They are not subjected to notice and comment rulemaking; they are not regulations. *Hi-Ridge Lumber Co. v. United States,* 443 F.2d 462, 455 (9th Cir. 1971) (Manual "does not rise to the status of a regulation").

[4] Nor are the Manual and Handbook promulgated pursuant to an independent congressional authority. The National Forest Management Act authorizes the Secretary to promulgate regulations, but the Manual and the Handbook are not regulations from the Secretary. 36 C.F.R. § 200.4(d)(1) (1995) (Chief of Forest Service promulgates rules in Manual

and Handbook). The manual and handbook provisions are contemplated in a Service regulation, not in a congressional statute.

[5] We hold that the manual and Handbook do not have the independent force and effect of law.

B.

Western also argues that even if the Manual and Handbook do not have the independent force and effect of law, sections 251.52 and 251.54(i)(1) incorporate by reference the Manual and Handbook and therefore bind the Service to the procedural guidelines contained therein. Western argues that section 251.52, which requires special use permits to comply with "the instructions of the Chief," effectively binds the Service to the provisions in the Manual and Handbook. Western also argues that section 251.54(i)(1), which states that an officer "may deny issuance" of a permit if the permit would be incompatible with existing uses, requires the Service to look to the Manual and Handbook for compatability guidelines.

[6] Neither of these arguments has merit. Both the Supreme Court in *Chrysler,* 441 U.S. at 301, and our court in *Fifty-Three Parrots,* 685 F.2d at 1136, explicitly require agency rules to be substantive and to be promulgated according to certain procedural requirements before they can bind an agency. Even assuming that the Manual and Handbook are somehow incorporated into the Secretary's regulations (although they are not mentioned in either section 251.54(i)(1) or 252.52, the Secretary cannot bind the Service to a Manual or Handbook that is neither promulgated pursuant to congressional procedures nor contemplated in a statue. Mere incorporation does not convert a procedural guideline

into a substantive regulation. We therefore have no authority to bind the Service to the guidelines in the Manual or the Handbook. Even if we did have that authority, there is nothing in the record to support Western's complaints that the Service violated the provisions in the Manual or Handbook.

C.

Because we hold that neither the Manual nor the Handbook has the force and effect of law, we review the Service's issuance of a permit only under its binding regulations. After eliminating the claims based on the Manual and Handbook, Western seems to argue that the Service failed to follow 25 C.F.R. § 251.54(i)(1) and therefore acted arbitrarily and capriciously.

[7] Section 251.54(i)(1) specifies that the Service may consider whether a special use permit would be compatible with existing uses. Although the provision is discretionary, we hold that the Service did make a compatibility assessment and that its decision to issue Slater a building permit was not arbitrary or capricious. The permit authorizes Slater to construct a new facility and raze its old one. The permit does not authorize any new uses that could cause interference. To the extent that merely moving sites or changing equipment will create new interference problems, the permit provides that if Slater's "installation of [new] radio equipment or tower causes interference, [Slater] will be required to make adjustments to solve the interference problem, or remove the problem causing equipment. If interference problems cannot be resolved, authorization for the use will be terminated and equipment removed from the site." The Site Plan therefore considered the issue of compatibility even though the record contains no documented evidence of incompatibility. In fact,

Oberdorfer, Western's president, technician, and general manager, admitted that a properly constructed new facility might actually reduce "considerably" potential interference. Overall, the record indicates that the Service did consider compatibility of uses and did not abuse its discretion in issuing a permit to Slater.

IV

Western argues that the district court erred in holding that it did not have standing to assert a claim under NEPA. We review the issue of standing de novo. *Nevada Land Action,* 8 F.3d at 715.

In *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992), the Supreme Court delineated the three minimum constitutional requirements to have standing to challenge an alleged injury. First, the plaintiff must allege an actual or imminent invasion of a concrete and legally-protected interest. Second, there must be a causal connection between the injury and the alleged harmful conduct. Third, it must be likely that a favorable decision will redress the injury. *Id.* at 560-61.

Because NEPA suits are reviewed under the Administrative Procedure Act, *Marsh,* 490 U.S. at 375-76, a plaintiff alleging a NEPA claim must also "assert an interest arguably within the zone of interests to be protected or regulated" by NEPA. *Nevada Land Action,* 8 F.3d at 715-16 (citation and internal quotation omitted). NEPA's purpose is "to protect the environment, not the economic interests of those adversely affected by agency decisions. Therefore, *a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA." Id.* at 716 (citations omitted and emphasis added); *Port of Astoria v. Hodel,* 595 F.2d 467, 475 (9th Cir. 1979) (*Hodel)* (where alleged injuries "represent only pecuniary losses and frustrated

financial expectations that are not coupled with environmental considerations," injuries are outside NEPA's zone of interests).

Despite our more recent decision in *Nevada Land Action* to the contrary, Western points to language in *Hodel* that suggests that a plaintiff who suffers purely economic injury may still have standing. In *Hodel,* several plaintiffs alleged that the construction of an aluminum reduction plan would severely impact the environment. Another plaintiff, Hermiston Broadcasting Company, complained only that power transmission lines to be built to service the plant would interfere with Hermiston's broadcasts. *Hodel* held that the primary impact of the plant was environmental, and that Hermiston had standing because its purely economic injuries were "causally related to an act that lies within NEPA's embrace." *Hodel,* 595 F.2d at 476.

[8] Although this narrow holding in *Hodel* may cause tension with the broader and more recent holding in *Nevada Land Action*, we need not pursue the matter. Western's only complaint is that the Service's permit will cause economically harmful interference. No one alleges that Slater's new facility "will have a primary impact on the natural environment." *Id.* On appeal, Western now attempts to characterize the alleged interference as an "environmental impact," yet Oberdorfer admitted that Western's sole complaint was alleged interference, which we have held is purely economic. *See id.* (allegations that new transmission lines would cause broadcast interference "may be classified as economic"). Western's injury is therefore not one that NEPA aims to redress.

V.

Slater asks that we exercise our discretion and impose

sanctions against Western and its counsel. Fed. R. App. P. 38; 28 U.S.C. §§ 1912, 1927. Although we have little tolerance for plaintiffs who use our court solely as a means of harassment or competitive gain, we do not believe that Western's appeal is frivolous. Therefore, we decline to impose sanctions in this case at this time.

AFFIRMED.

APPENDIX B -- ORDER DATED MAY 3, 1994

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF OREGON

Civil No. 93-552-MA

WESTERN RADIO SERVICES COMPANY,
INC., Oregon corporation
APPELLANT

v.

MICHAEL ESPY et al,
APPELLEES

Appeal from the United States District Court
for the District of Oregon
Malcolm F. Marsh, District Judge, Presiding

Marsh, Judge.

In accordance with my opinion filed on this date, plaintiff's motion for summary judgment (#36) is DENIED; federal defendants' motion for summary judgment (#44) is GRANTED; defendant Slater's cross-motions for summary judgment (#60, #61) are GRANTED insofar as they join in federal defendants' motion for summary judgment and are DENIED as MOOT as to other issues not reached with this opinion. Slater's request for Rule 11 sanctions is denied. All pending motions to supplement and strike are DENIED as MOOT.

IT IS SO ORDERED.

APPENDIX C -- OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED MAY 3, 1994

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF OREGON

No. 93-552-MA

WESTERN RADIO SERVICES COMPANY, INC., Oregon corporation
APPELLANT

v.

MICHAEL ESPY et al,
APPELLEES

Appeal from the United States District Court
for the District of Oregon
Malcolm F. Marsh, District Judge, Presiding

Opinion by Judge Marsh

MARSH, Judge.

Plaintiff filed this action seeking declaratory and injunctive relief against the Forest Service's issuance of a special use permit to Slater Communications & Electronics, Inc. ("Slater") for the construction of a communications facility at Gray Butte in the Crooked River National Grassland. Plaintiff, federal defendants and defendant Slater have filed cross-motions for summary judgment and all parties agree that the issues are ripe for decision based upon the administrative record and documents now on file.

BACKGROUND

The administrative record in this action reveals that Gray Butte has been an active site for communications facilities since the late 1960s. The original Gray Butte Electronic Site Plan of 1970-73 notes six permittees holding permits on Gray Butte for TV translator, radio and transmission line installations. AR 5-12. Defendant Slater received a permit to install, maintain and operate "electronic equipment" with FCC station authorization on February 3, 1976. AR 13-16. Slater has used this permit for mobile radio communications. Plaintiff received a similar permit for 2-way mobile radio communication facilities in 1978. AR 17-20.[1] Permits are contingent upon FCC authorizations and applicable FCC licensing requirements. AR 206.

On December 6, 1986, federal defendants issued a special use permit to Slater for the construction of a new building on

Gray Butte.[2] AR 202-210. Plaintiff appealed this decision and eventually settled with the federal defendants and Slater by entering into a settlement whereby the Forest Service agreed to update the 1981 site plan. AR 268-271.

On June 20, 1989, the Forest Service adopted an updated site plan for Gray Butte. AR 291-304. On August 1, 1989, the Forest Service prepared an Environmental Impact Statement and Record of Decision for the Ochoco National Forest which included the Gray Butte site plan as a designated "electronic site." AR 347-418.

Thereafter, on March 8, 1990, the District Ranger issued a new special use permit to Slater to replace its building on Gray Butte and construct a new building approximately 160' from plaintiff's facilities. AR 479-513. Plaintiff appealed this decision and its appeal was denied on July 27, 1990 by the Forest Supervisor. AR 937-941. In his decision, the Supervisor cited that fact that the output of the power transmitters would be limited to a maximum of 150 watts and further, that the new permit would not authorize any additional equipment not already operating at the site. AR 938.

Plaintiff appealed the Supervisor's decision to the Deputy Regional Forrester [sic]. On January 16, 1991, the Regional Forrester [sic] affirmed the District Ranger's decision to issue the permit to Slater finding that:

> "[T]he Forest Supervisor and District Ranger acted appropriately in deciding that the special use permit for replacing and constructing a building and tower on

> Gray Butte can be issued to Slater Communications and Electronics, Inc. If the building and tower cause interference, the Site plan had adequate provisions to require the offender party to add filters or other equipment that would mitigate any interference caused."

AR 985. However, the Regional Forrester [sic] [sic] also found that the record was devoid of "any attempts to resolve potential incompatibility" and therefore directed the Forest Service Supervisor to either document such efforts if they took place, and if they did not, to "invite users on the site, including the applicant, to meet to discuss any concerns they may have about potential incompatibility of the proposed action and attempt to come to some resolution of potential incompatibility." AR 986, 997.

Pursuant to the Regional Forrester [sic] 's directive, the District Ranger conducted four meetings with Gray Butte users, including plaintiff and Slater, on March 6, 1991, April 4, 1991, April 30, 1991 and October 16, 1991. AR 1004, 1019-21, 1034-36, 1055-58. The first "meeting objective" identified was to determine "how to resolve potential interference and incompatibility." AR 1004. Slater proposed relocating his new building outside the designated site area to the northeast to eliminate interference problems. Id. Plaintiff proposed that it by [sic] allowed to replace its site to an area south of its present site and that it be allowed to relocate antennas to a sidehill to reduce interference, and noted that there appeared to be no opposition to either its proposal or Slater's. AR 1005. At the April 4, 1991 meeting, Slater again proposed a new location for his building on the southeast side. At the April 30, 1991 meeting, the users discussed technical site standards and "briefly discussed" four alternatives for relocating Slater's building. AR 1036. The

minutes note that issues the users will consider an evaluating the four alternatives include: site impacts, interference and visual impacts. *Id.*

On August 22, 1991, the Regional Forester issued a memorandum noting that the parties met the requirements of his remand regarding compatibility discussions and directing that the Forest Supervisor could proceed with issuing the permit to Slater. AR 1052.

During the fourth meeting on October 16, 1991, the user group convened its meeting at the Gray Butte site to evaluate the four proposed alternative locations for Slater's new building. Plaintiff urged the group to accept Alternative 2 which would have placed the building to the north. The group rejected this proposal finding that the site was "too steep to be feasible for construction." Slater indicated that it preferred Alternative 4 to the southeast, approximately 153' from plaintiffs' facility. Plaintiff objected on grounds that this alternative would not provide the "most separation," and, according to the minutes "insisted that the minimum acceptable separation from his tower to any new development is 200 feet." AR 1057. The group then paced off 200 feet and decided that the southeast location "would still be feasible." Minutes reflect that the group then "agreed" that this location would be the preferred location. Plaintiff disputes that he ever agreed to the southern location. AR 1059; Second Affidavit of Richard Oberdorfer, p.7.

On November 19, 1992, the Forest Service issued a supplemental environmental impact statement (SEIS), a finding of no significant impact (FONSI), and a supplement Gray Butte Electronic Site Management Plan for the Ochoco National Forest pertaining to changes at the Gray Butte Electronic site and the decision to select "Alternative E" (the location 200' southeast from plaintiff's facility selected by the user group) for the construction of Slater's new facility. The

SEIS notes public involvement though the participation of the electronic site users who explored alternative locations "because they perceived interference problems" with the original site. AR 1094-95; 1099.

Plaintiff's communications facility is 40' from Slaters current facility and approximately 200' from the proposed new construction site. Plaintiff contends that it has experienced interference with other existing facilities[3] and that it anticipates that the interference will continue and worsen with Slater's new facility. Plaintiff asserts two claims for relief: first, that the issuance of the permit violates the National Forest Management Act (NFMA), 16 U.S.C. § 497; and second, a violation of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, because defendants failed to adequately consider reasonable alternatives in the preparation of environmental assessments.

On September 17, 1993, I denied federal defendants' motion to dismiss the complaint, rejecting their assertion that, under the doctrine of primary administrative jurisdiction, plaintiff "essentially" raised an issue of radio interference to which the Federal Communications Commission (FCC) has primary jurisdiction and administrative expertise. In so holding, I noted that plaintiff's complaint focussed on a fairly

narrow challenge to the Forest Service's decision of November 19, 1992. I further noted that, although Plaintiff might have filed a complaint against Slater before the FCC regarding *interference*, plaintiff's challenge against the Forest Service in this case relates to the site selected for construction of a communications facility and whether the Forest Service adequately considered interference within this limited context. In addition, I denied defendants' motion to dismiss for failure to state a claim under the NMFA, finding that, based upon the Ninth Circuit's decision in *Kola, Inc. v. United States,* 882 F.2d 361, 364 (9th Cir. 1989), the issuance of a special use permit is subject to judicial review. Finally, I rejected defendants' motion to dismiss plaintiff's NEPA claim for insufficient proof of redressibility, and rejected an untimely argument for dismissal on standing grounds, noting that economic injury *might* state a claim under a narrow exception noted in *Port of Astoria, Oregon, v. Hodel* 585 F.2d 467, 476 (9th Cir. 1979).

DISCUSSION

1. NFMA Violations

The decision to issue or not to issue a special use permit under the NFMA is generally subject to judicial review. *Kola, Inc. v. United States,* 882 F.2d 361, 364 (9th Cir. 1989); and *Methow v. Reg. Forrester [sic]* , 883 F.2d 810, 813 (9th Cir. 1987), *rev'd on other grounds sub nom, Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835 (1989). A Forest Service permit decision under the NFMA is reviewable by way of the Administrative Procedures Act, 5 U.S.C. § 701, *et seq.,* and is subject to an abuse of discretion, arbitrary and capricious standard of review. *Kola* 882 F.2d at 363-64.

The statute invoked in count one is NFMA, 16 U.S.C. § 497 which provides in pertinent part as follows:

> "The Secretary of Agriculture is authorized, under such regulations as he may make and upon such terms and conditions as he may deem proper . . . (c) to permit the use and occupancy of suitable areas of land within the national forest, . . for the purpose of constructing or maintaining buildings, structures and facilities for industrial or commercial purposes whenever such use is related to or consistent with other uses on the national forests."

In 1980, the Forest Service adopted regulations setting forth standards to consider in issuing special use permits. 36 C.F.R. § 251.54. Thereafter, in *Kola*, the Ninth Circuit noted that the Secretary's 1980 regulations provided sufficient guidelines regarding permit applications to enable a district court to determine if a permit grant or denial was arbitrary, capricious or an abuse of discretion. *Kola,* 882 F.2d at 364.

Specifically, such guidance exists in 36 C.F.R. 251.54(i)(1) which provides that an officer may deny a special use permit if the proposed use "would be inconsistent or incompatible" with other existing forest uses. Under *Kola*, radio frequency compatibility is a factor the Secretary is directed to consider and thus, his failure to do so -- either completely or adequately -- is subject to judicial review under the limited standards set forth in the APA.

In this case, plaintiff claims that the Forest Service failed to determine if Slater's special use permit would be "compatible" with existing uses at the site in violation of 36 C.F.R. 251.54(i)(1) and further, failed to utilize interference criteria set forth in the Forest Service Manual (FSM), Forest Service Handbook (FSH) and the original 1980 site plan.

Specific criteria identified in the FSH and Site Plan include frequency relationships, geographic separation, the amount and period of power transmission, and equipment design characteristics. AR 1160. Plaintiff claims that the Forest Service considered only one of these factors -- the amount of power transmission -- in reaching its decision to issue the Slater permit. In addition, plaintiff argues that the FSH requires that existing users must agree on compatibility prior to the issuance of a permit and that permits be denied where there is capacity available in existing facilities. Plaintiff's specific complaint with the Slater permit which it feels threatens to harm its financial interest is the Forest Service's failure to adequately consider location and spacing.

Government defendants contend that they have fulfilled duties imposed by the applicable Forest Service Regulations. In addition, government defendants dispute that either the FSM or FSH has the force of law under 36 C.F.R. § 251.52 since neither constitutes a duly promulgated regulation, but contend that even if legally binding, they have complied with both.

First, I agree with the federal defendants that neither the FSH or FSM have the force or effect of law because they are general guidelines for use by Forest Service employees and are neither published in the federal register nor codified in the Code of Federal Regulations. *Lumber Prod. & Indus. Work Log Scalers v. United States,* 580 F. Supp. 279, 283-84 (D. Or. 1984) (FSM does not have force and effect of law, rejecting NEPA claim filed by lumber work's union against FS' recognition of a competing log scaler coop); *Hoskins Lumber Co. Inc v. United States* 24 Ct. Cl. 259, 266 (1991) (same); see also Hi-Ridge Lumber Co. v. United States, 443 F.2d 452, 455 (9th Cir. 1971) (noting in dicta that FSM does not "rise to the status of a regulation"); Stone Forest Ind., Inc. v. United States, 973 F.2d 1548, 1551 (Fed. Cir. 1992);

ONRC v. Devlin, 776 F. Supp. 1440, 1447-48 (D. Or. 1991) (Forest Service Guide re vegetation management do not have force and effect of law). Thus, federal defendants' alleged non-compliance with FSM or FSH provisions is not subject to judicial review.

Further, even if I did find that the FSH and FSM imposed mandatory, judicially reviewable obligations upon the Forest Service, I find that the criteria set forth in those documents were satisfied -- power transmission levels, equipment design as well as technical interference and spatial factors were all considered through these Forest Service-user group meetings.[4]

Therefore, the single issue remaining under the NFMA is whether the Forest Service acted arbitrarily or capriciously in approving the second location for the Slater facility under 36 C.F.R. 251.54(i)(1) by failing to adequately address compatibility issues. From my review of the record, I find that the four meetings that took place between the Gray Butte site users and the District Ranger following the Regional Forester's January 16, 1991 directive fully addressed the federal defendants' duties to address compatibility concerns pursuant to 36 C.F.R. 251.54(i)(1). The product of these meeting formed the basis for the Forest Service's ultimate decision to amend the site plan and go forward with permitting construction under the permit in the November 19, 1992 decision notice, SEIS and FONSI that plaintiff challenges in this case.

Based on the foregoing, I find that plaintiff has failed to demonstrate that the federal defendants acted arbitrarily or capriciously in issuing the construction permit to Slater or in amending the Site plan and issuing an SEIS and FONSI on November 19, 1992. Accordingly, plaintiff's motion for summary judgment in favor of its first claim is denied and defendants' cross- motions against claim are granted.

2. NEPA Violations

Two months after my decision denying defendants' motions to dismiss plaintiff's NEPA claims on standing grounds, the Ninth Circuit issued its decision in *Nevada Land Action Ass'n v. U.S. Forest Services*, 8 F.3d 713 (9th Cir. 1993) which holds that "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA." *Id.*, at 716. Although the Ninth Circuit did not cite that portion of the decision in *Port of Astoria v. Hodel*, 595 F.2d 467 (9th Cir. 1979) that I relied upon in denying defendants' motion to dismiss, *see Id.*, at 476 (standing re Hermiston Broadcasting Company), it fails to acknowledge the distinction drawn in *Port of Astoria* between economic injuries in general and economic injuries that are "causally related to an act that lies within NEPA's embrace," by categorically excluding from NEPA standing those with economic injuries.

Standing is a basic jurisdictional prerequisite. *See Idaho Conservation League v. Mumma,* 956 F.2d 1508, 1513 (9th Cir. 1992). Plaintiff does not dispute that its basis for standing in this action is its own financial interests. *See* Complaint, para. 21. Based upon the court's recent decision in *Nevada Land Action,* I find that the plaintiff lacks standing to pursue its claim under NEPA.

Further, even assuming plaintiff had standing under

NEPA, I agree with defendants that the relocation of Slater's facility is not a "major" federal action having a "significant impact" on the environment which would trigger additional NEPA requirements. In addition, I would also find that plaintiff would lack standing to raise the issue of prior public participation in the preparation of the SEIS and FONSI since, as a site user, plaintiff was actively involved in the process and had a full opportunity to raise its concerns and grievances regarding site selection, interference and compatibility concerns prior to the issuance of the SEIS and FONSI. Finally, I agree with the federal defendants that plaintiff has failed to establish redressability -- although the record is replete with plaintiff's complaints regarding interference and potential interference in the past, there is nothing in the record to substantiate plaintiff's claim that interference will be exacerbated by the construction of Slater's new facility.

CONCLUSION

Based on the foregoing, I find that plaintiff has failed to establish that the federal defendants' actions were arbitrary or capricious under the NFMA and further find that plaintiff has failed to state a viable claim under NEPA. Accordingly, plaintiff's motion for summary judgment (#36) is DENIED; federal defendants' motion for summary judgment (#44) is GRANTED; defendant Slater's cross-motions for summary judgment (#60, #61) are GRANTED insofar as they join in federal defendants' motion for summary judgment and are DENIED as MOOT as to the other issues not reached with this opinion. Slater's request for Rule 11 sanctions is denied. All pending motions to supplement and strike are DENIED as MOOT.

DATED this 3 day of May, 1994.

Malcolm F. Marsh
United States District Judge

APPENDIX D -- AFFIDAVIT OF LESLIE F. SMITH, JR.

I, Leslie F. Smith, Jr., Being duly sworn, say:

1. I make this affidavit in support of Western Radio Services and Richard Oberdorfer in the appeal of the above-captioned Decision Notice authorizing the issuance of a special use permit to Slater Communications for the construction of a tower and building at the Gray Butte Electronics Site.

2. I hereby affirm that the attached statement represents my opinion regarding the potential adverse impacts of the proposed construction on the existing users of the Gray Butte site and on Richard Oberdorfer's facility in particular.

Dated: April 16, 1990.

/s/ Leslie F. Smith, Jr.

SUMMARY EVALUATION OF INTERFERENCE FACTORS AT GRAY BUTTE

Leslie F. Smith, Jr. is principal of Tele-Smith Associates, a telecommunications consulting company located in Eugene, OR.

He owned and managed Telecomm Systems, Inc. for over 30 years. He was one of the organizers and President of Oregon Radio Frequency Council. He is presently President of Oregon Radio Common Carriers Association. Licensed by the FCC (Radio Telephone 1st), National Association of Radio

& Telecommunications Engineers. Member of Institute of Electrical and Electronic Engineers. Has done FCC land mobile application engineering. Done work for Alyeska Pipeline Service Co..

The map submitted with the prospectus shows that there will be approximately 50' separation between the prospectus site and the existing communications sites. This spacing will provide only approximately -36 db isolation wheras most land mobile systems need on the order of -90 db. The same 50' separation in the vertical plane will yield approximately -62 db isolation. In most systems additional devices are necessary to provide the proper isolation which in all cases creates a reduction in performance over that of a system without the additional devices.

At frequencies of 152 MHZ obstacles with dimensions of 3.078' which equals one (1) wavelength will cause substantial disruption to the propagation of RF energy. In the prospectus an antenna tower of 20' on side is permitted. This dimension will have an adverse affect on existing systems due to the size and close proximity.

If transmitters that are installed on the proposed tower are of the broadband variety, the potential for transmitter intermodulation interference is extremely high. Transmitter intermodulation is one of the more difficult types of interference to locate and correct.

It is my opinion that no additional tower should be constructed and that one of the existing towers should be used to accommodate any new antennas. If this accommodation can not be reached then the new tower should be constructed to a height to provide vertical isolation of at least 100 db.

As part of this evaluation are attached copies of ORFIC Standards that were adopted which are noted as MINIMUM.

ORFIC RECOMMENDED MINIMUM SITE STANDARDS FOR RADIO COMMUNICATIONS

1. Transmitters should have a band pass cavity that would provide:

   30-50 MHZ, 20db attenuation at 500 KHz

   70-88 MHZ, 10 db attenuation at 1 MHZ

   130-170 MHZ, 10 db attenuation at 350 KHz

   400-520 MHZ, 5 db attenuation at 1 MHZ

2. Transmitters operating in the range of 130-520 MHZ should also have a ferrite isolator with a minimum of 20 db rejection in the reverse direction. The isolator should be installed between the transmitter and the cavity.

3. Notch type duplexers should be preceded by a band pass cavity.

4. A low pass filter or a band pass cavity should be between the isolator and the antenna.

5. Jacketed Heliax transmission line is recommended. Unjacketed transmission line of any type is strongly discouraged.

6. To secure transmission line to towers, nylon tie wraps or insulated wire is recommended. Wrap lock is discouraged.

7. The use of double shielded coaxial cable from radio equipment to isolators, cavities, duplexers, etc. to heliax transmission line is strongly recommended.

8. Radio equipment should be housed in RF tight metal cabinets and properly grounded.

9. Antennas should not be indiscriminately moved after initial mounting and test.

10. Consideration should be given to insulating guy wires, bonding across clevices brackets, etc. Do not leave loose wire or metal objects on towers.

11. It is recommended that a band pass cavity be placed in the feedline to receivers.

12. In extreme cases of radio interference, notch filters, crystal filters and dual ferrite isolators and/or band pass cavity may be required. The need for additional filtering equipment will be determined on a case by case basis.

13. Each transmitter should be identified with a copy of the FCC license, person's name and phone number responsible for the equipment, the receive frequency and transmit frequency, plus any tone control frequencies.

These recommendations are made as a result of actual experience of ORFIC members who have found serious intermodulation problems caused by failure to meet those standards listed above.

APPENDIX E -- AFFIDAVIT OF RICHARD OBERDORFER

1. My name is Richard Oberdorfer and I make this affidavit in support of Western Radio Service Inc.'s Motion For Summary Judgment in this case.

2. I am the founder and President of Plaintiff Western Radio Services, Inc. (WRS), an Oregon corporation in good standing. WRS has been operating a mobile radio communications site at the Gray Butte electronics site in the Ochoco National Forest since 1978, when it was awarded a special use permit for the site by the Forest Service. Under the permit and in reliance upon the plans, rules, and regulations protecting users and facilities on the Gray Butte Electronic Site, Western Radio Services has made Gray Butte the cornerstone of its operations. WRS has made a substantial investment in installing, operating, and maintaining high quality equipment at Gray Butte since 1978.

3. During the 15 years that WRS has held a special use permit for operation of the Gray Butte site, I have visited the site on innumerable occasions and have participated in numerous meetings with the Forest Service and other site users.

4. The operation of some of the other permittees at the Gray Butte site has caused significant interference with the operation of WRS's facility, has significantly decreased the quality of the service WRS is able to provide to its customers, and has caused customers to leave WRS or not sign on with WRS. The ability to provide high quality communications service to our customers is essential to the financial survival of WRS. Currently the health and future of our business is

impaired and is threatened with further impairment by interference with our transmissions caused by incompatible uses, equipment, operations, and facilities at the Gray Butte site which do not comply with applicable regulations, standards, plans, and guidelines.

5. I have attempted to inform the Forest Service of interference problems in two ways. First, I have repeatedly commented upon and objected to proposed special use permits prior to their issuance, to inform the Forest Service of the problems that could be anticipated given the nature of the equipment authorized by the proposed permit. Second, I have frequently informed the Forest Service of actual interference problems as they occur at the site and violations of permit terms by other permittees when I have discovered such violations.

6. I have reviewed the Administrative Record (AR) filed by the Forest Service in this case. That record documents some, but by no means all, of my attempts to inform the Forest Service of interference problems at the site. In my notice of appeal to the Forest Supervisor of June 12, 1987, I identified a number of specific interference problems I had experienced at the site. AR at 0253, 0254. The Forest Service never investigated or responded to the specifics in this appeal. As early as 1979 I had informed the Forest Service and FCC of interference problems at this site. AR at 0021 - 0023. In 1980 the Forest Service acknowledged interference problems (AR at 0026 - Forest Supervisor letter to Regional Forester) but since that time the Forest Service has been reluctant to acknowledge or investigate interference problems and has issued a number of special use permits for facilities and uses that have contributed to further degradation of the site.

7. The Forest Service granted a special use permit for a continuous broadcast television transmitter to Rod Johnson over the objection of the Forest Service's own radio technician. AR 0199. See Exhibit A to this affidavit, attached. Interference problems are also documented in the record at AR 0201 (November 19, 1986, letter to District Ranger documenting interference problems); 0211 (December 16, 1986, letter documenting interference); 0212 (responding to December 16 letter - enforcement action taken); 0213 (January 14, 1987, letter); 0216 (February 17, 1987 letter from Alan Slater to District Ranger acknowledging improper installation of towers); 0230 (April 18, 1987, letter identifying interference and summarizing oral presentation); 0240 (letter from WRS to Forest Supervisor explaining where interference is occurring and why); February 18, 1988, letter from WRS to District Ranger identifying interference problems); 0283 (June 1, 1989, letter from WRS to Forest Supervisor documenting interference experienced both by WRS and G.L. Mobilcomm); August 4, 1989, notice of appeal to Regional Forester, referring to interference experience by WRS and G.L. Mobilcomm); 0461 (January 23, 1990, letter from WRS to Forest Supervisor identifying Slater Communications facility as source of ongoing interference problems); 0606 (April 16, 1990, affidavit of Leslie Smith, former organizer and President of Oregon Radio Frequency Council, identifying interference problems at Gray Butte site); 0710 (May, 1990, decision memo authorizing special use permit for Warm Springs tribe, noting interference problems raised during public scoping); 1053 (September 27, 1991, letter from WRS to district ranger explaining interference problems and causes); 1059 (November 16, 1991, letter from WRS to district ranger, stating WRS is losing customers and can't fill space in facility due to interference problems)

8. WRS has not been the only permittee to experience interference problems at the site. As noted above, G.L. Mobilcomm has also experienced these problems. On May 14, 1991, G.L. sent the district ranger a letter noting serious interference problems and stating that G.L. was losing customers as a result. AR at 1040. This letter also documents the fact that Slater Communications backed out of an agreement that all three facility owners had reached as to the best location for Slater's site. Attached to this affidavit as Exhibit B is an additional letter from G.L. Mobilcomm that was not included in the record, again stating that there are interference problems and G.L. is losing customers.

9. Attached to this affidavit are additional documents demonstrating that my customers have experienced problems with interference at the Gray Butte site. See Exhibits C - F. Also attached are several exhibits showing that Slater Communications has been the source of many of these interference problems. See Exhibits G - L (including documentation that Slater Communications has repeatedly installed unauthorized transmission equipment in its already sub-standard facility). The Slater Communications facility at the Gray Butte site is nothing more than a wooden shed with a metal roof, and was scheduled for removal in 1986 due to its substandard quality and consequent potential for interfering with other facilities at the site. As of the time of this affidavit, Slater's facility is still operating at the site and still causing interference with the operation of my facility. I have invested substantial resources in keeping my facility up to date and reducing any potential for interference from my facility. Slater has not made a similar investment.

10. The WRS facility at the Gray Butte site is operating at only 50% of capacity. To my knowledge, the GL

Mobilecomm facility at the site is also operating at roughly 50% of capacity. Additional compatible uses of the site can certainly be accommodated in existing facilities. I can find nothing in the record to show that the Forest Service has determined that the demand for compatible uses at the site exceeds the capacity in existing facilities.

11. At the last inspection of the Slater Communications facility on April 27, 1992, I found noncompatible uses and two-way equipment that did not meet manufacturers' specifications and was installed in an electrically and mechanically unsound manner.

12. In 1989, WRS's special use permit was amended to locate a standby generator and propane tank on an existing concrete slab near its facility. Prior to the installation of the propane tank, and without first obtaining a special use permit to do so, Slater Communications installed a 20-foot monopole tower on the same concrete slab. The tower has prevented WRS from installing the propane tank. The Forest Service has refused to require Defendant Slater Communications to remove its tower. During a review of CRNG permit files on January 14, 1994, I could not find an authorization for the tower, and to the best of my knowledge, none exists. The transmitters installed on this tower are interfering with WRS's ability to provide high quality service to its customers.

13. The history of noncompliance and nonenforcement described in the record and in this affidavit renders it impossible for me to assure existing and potential customers that these problems will be corrected by allowing new and continuing incompatible and noncomplying uses and facilities subject only to the same kind of conditions and enforcement procedures that have been repeatedly demonstrated to be

ineffective. Such assurance will be possible for WRS and its customers only when the Defendant Forest Service makes a demonstration of full compliance with all compatibility requirements a precondition to approval and imposes conditions based upon clear and objective technical standards.

14. Large areas of public waters, forest lands, rangelands, and a national monument are protected in part by emergency fire, police, and safety services dependent upon clear, reliable electronic telecommunications through the Gray Butte electronic site. Interference caused by the incompatibility and noncompliance described here and in the record pollutes and significantly impairs the public airwaves in the region served by Gray Butte. In my opinion as a longtime operator and user of Gray Butte and the natural resources surrounding it, the supplemental Environmental Assessment and the documents to which it is tiered completely fail to show how the site plan amendment, assessment, and authorization under review will avoid or mitigate these significant and adverse impacts to the environment of Central Oregon. In my opinion as an experienced user of the site and owner, operator, and user of mobile telecommunications sites, including Gray Butte, these documents provide no information, data, analysis, enforcement standards or mechanisms upon which I or my customers can reasonably base a judgment that the site will function without continuing unnecessary and damaging interference.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge.

Dated this 25th day of January, 1994.

/s/ Richard L. Oberdorfer

APPENDIX F -- AFFIDAVIT OF KENNETH R. REISWIG, SR.

I, KENNETH R. REISWIG SR. make the following affidavit under penalty of perjury:

1. I am Senior Communications Technician for Pacific Power and Light. Pacific Power and Light has had a transmitter WNHJ 514 on Gray Butte since about 1989. I have been involved in the maintenance and repair of this transmitter for about 3 years. I have been aware and taken steps to minimize the interference problem at Gray Butte to our facilities, pretty much without success.

2. We have cavities on the VHF and UHF links, plus a crystal filter and isolator (to prevent us from interfering). We tuned the cavity on the VHF as tight as possible for more attenuation on receive. We tried to make our grounding as good as possible, with the ground mat available. The interference, which involves some kind of mixing, is telephone conversations and dialing, busy signals and the Jefferson County Sheriff. The interference seems to be much worse at times, fading to usable levels.

3. Our new method of solving the interference to Pacific Poser and Light Co. involves leaving the site, we have a new site on Grizzly Mt. and all indications are that we are not going to have a problem at this new site. We will be leaving Gray Butte sometime in April 1994, so any interference on Gray Butte will not be caused by Pacific Power and Light Co.

DATED this 29th day of March, 1994

/s/ Kenneth R. Reiswig, Sr.

APPENDIX G -- COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTORY STATEMENT

1.

This is an action for declaratory and injunctive relief to prevent the installation or, if necessary, to require the removal of an additional telecommunications tower on Gray Butte, northeast of Madras, Oregon. Plaintiffs contend that Defendants have failed to comply with and enforce applicable rules requiring that the proposed facility and operation will not cause, continue, or aggravate interference with existing telecommunications facilities and operations serving Central Oregon from the Gray Butte site. Specifically, Plaintiff challenges the following decisions of the Forest Supervisor for the Crooked River National Grassland, Ochoco National Forest, Pacific Northwest Region of the U.S. Forest Service (Forest Service) as set forth in its Decision Notice of November 19, 1992, (Exhibit A):

1) granting a Special Use Permit to Slater Communications and Electronics, Inc. (Slater);

2) amending the Gray Butte Electronic Site Plan;

3) making a Finding of No Significant Impact (FONSI) under the National Environmental Policy Act of 1969 and thereby deciding not to prepare an Environmental Impact Statement (EIS); and

4) authorizing implementation of the subject decisions and the erection and operation of the additional communications facilities.

2.

Plaintiff seeks preliminary and permanent injunctions directing the federal defendants to rescind the decision of November 19, 1992, and any subsequent affirmance thereof, unless and until defendants comply with 16 U.S.C.§ 497(c), 36 C.F.R. §§ 251.54-.56, NEPA, and 40 C.F.R. §§ 1501-1508, as described in paragraphs 24-30. Plaintiff also seeks declaratory judgments interpreting the "consistent use" requirements of 16 U.S.C. § 497(c) and 36 C.F.R. §§ 251.54(i), .56(a)(2), as described in paragraphs 24-25, and declaring defendants actions to be in violation of law as alleged herein.

JURISDICTION AND VENUE

3.

This court has subject matter jurisdiction over this action under 28 U.S.C. § 1331 (federal question jurisdiction). Plaintiff's cause of action arises under the Administrative Procedures Act (APA), 5 U.S.C. §§ 702 and 706; the United States Forest Planning Act, and implementing regulations 16 U.S.C. § 497(c); 36 C.F.R. §§ 251.54-.56; and the National Environmental Policy Act (NEPA) and implementing regulations, 42 U.S.C. §§ 4321 *et seq.*; 40 C.F.R. §§1501-1508.

4.

Venue is properly vested in this court pursuant to 28 U.S.C. § 1391(e).

PARTIES

5.

Plaintiff Western Radio is an Oregon Corporation in

good standing. Plaintiff is adversely affected and aggrieved by the defendant's administrative decision of November 18, 1992, and the May 4, 1993, affirmance thereof, as more fully described herein.

6.

Defendant Michael Espy is the United States Secretary of Agriculture. The Forest Service is an agency within the Department of Agriculture. Defendant Dale Robertson is chief of the National Forest Service. Defendant John Lowe is Regional Forester for the Pacific Region of the National Forest Service. Tom Schmidt is Forest Supervisor for the Ochoco National Forest. Byron Cheney is District Manager for the Crooked River National Grassland District of the Ochoco National Forest. All defendant federal officers are sued here in their official capacities.

7.

Defendant Slater Communications and Electronics (Slater Communications) is an Oregon Corporation in good standing with its principal place of business in Salem, Oregon. Defendant Slater Communications is the applicant for the permits, approvals, and determinations in question. Slater Communications currently owns and operates facilities on Gray Butte and will own and operate the facilities in question.

STATEMENT OF FACTS

8.

Plaintiff owns and operates a communications facility on Gray Butte in the Crooked River National Grassland, which is federal land under USDA and Forest Service jurisdiction. This facility uses UHF and VHF frequencies to provide services which include a public mobile telephone service, two-

way radio, and repeaters. Plaintiffs' facility, equipment, and operations are in full compliance with the Forest Service's Gray Butte Electronic Site Management Plan (Site Plan).

9.

Defendant Slater Communications operates a communications facility at Gray Butte, 40 feet from plaintiffs' facility. Defendant Slater Communication's buildings, equipment, and operations are substandard and do not comply with the Site Plan for Gray Butte. The Site Plan, among other things, called for the removal of the Slater facility several years ago. The interference problems have not been resolved or addressed in spite of repeated requests by the plaintiffs and in spite of extensive documentation of the problems. Slater's communications operations at Gray Butte have consistently generated interference with transmissions to and from the facilities of Plaintiff and other occupants of the Gray Butte Electronic Site.

10.

Defendants have failed to resolve the interference problems despite repeated requests and extensive documentation by Plaintiff. Defendant District Ranger has failed to carry out his obligation to suspend the authorization of the party in violation and terminate the incompatible use.

11.

In June 1989 the Gray Butte Electronic Site Plan was updated, and an Environmental Assessment (EA) completed.

12.

On March 6, 1990, the District Ranger granted a Special Use Permit to Slater for a building and tower, and approved the environmental assessment.

13.

Plaintiffs appealed, and the Forest Supervisor granted a stay in April 1990. On July 27, 1990 the Supervisor affirmed and granted the permit.

14.

Plaintiffs filed a second-level appeal to the Regional Forester on August 10, 1990. On January 17, 1991, the Deputy Regional Forester affirmed the Supervisor's decision, but noted that there was no documentation in the record showing that the Supervisor had complied with Forest Service Manual 2728.8 interim directive #68 (now Forest Service Handbook 2709.11, amendment 2209.11-92-17, § 7(3)(d)), requiring the decision officer to attempt to resolve potential incompatibility problems between the users. The Regional Forester's order therefore directed the Supervisor to complete the required process and document its completion.

15.

Following this order, the Forest Service held a series of meetings with plaintiff, with Slater Communications, with other users, and with consultants. The participants agreed on a specific location considered acceptable for future development, and the removal of Slater's existing facility by August 1, 1992. The official defendants and Slater Communications did not implement this agreement. As a result, the old Slater Communications facility remains in existence and in operation.

16.

On November 19, 1992, the Forest Supervisor issued a second Decision Notice authorizing the issuance of a Special Use Permit to Slater, amending the Site Plan, relocating Slater's building site, supplementing the March, 1990, EA,

and making a Finding of No Significant Impact (FONSI) under NEPA. The notice allowed implementation of the decision any time after December 6, 1992, in the absence of an administrative stay, pursuant to 36 C.F.R. § 217.10(a), (h). The special use permit authorized Slater Communications to construct a new facility at a site only 160 feet from Plaintiff's facility.

17.

The supplemental EA fails to consider all reasonable alternatives as required by 40 C.F.R. §§ 1502.14; 1508.9(b) Specifically, the EA fails to consider a no-action alternative, as required by 40 C.F.R. § 1502.14(d). The supplemental EA does not adequately address the impacts of each alternative, including cumulative impacts, as required by 40 C.F.R.§ 1508.9(b). It fails to address in any meaningful way the interference problem or current conditions and experience to date with operators, equipment, and facilities on the site. The EA also erroneously states that the existing users concur in the alternative selected.

18.

Plaintiffs filed an administrative appeal of the November 19, 1992, decision on January 14, 1993, with the Regional Forester, requesting a stay of the permit and a withdrawal of the decisions.

19.

On February 10, 1993, the Regional Forester denied plaintiffs' request for stay, allowing the issuance of the permit but stayed the construction at the new site. This was "the final administrative determination of the U.S. Dept. of Agriculture" regarding the request for a stay. On May 4, 1993, Defendant Deputy Regional Forester Richard A.

Ferrarro affirmed the November 19, 1993 determinations of Forest Supervisor Tom Schmidt, and in so doing, committed the same errors.

20.

The decision of November 19, 1992, as affirmed, to amend the Site Plan and issue a Special Use Permit to Slater, allowing Slater to relocate its communications facility and construct a new building and tower, does not adequately address the incompatibility problem or correctly apply the applicable law; as a result, the interference will continue and, in all probability, will worsen.

21.

These interference problems have seriously impaired the plaintiffs' ability to provide a consistently high level of service to their customers and have resulted in significant lost revenues and business opportunities. Gray Butte has remained a second-rate electronic communications site, unable to provide the affected users with the high levels of service that would otherwise be possible given Gray Butte's excellent location, setting, and configuration. The November 19, 1992, decision, and the May 4, 1993 affirmance thereof perpetuate these harms by failing to address the incompatibility between plaintiffs' existing use and the newly-approved use.

22.

If this court does not enjoin Defendants form issuing the permit, the facilities will be constructed and operated, interfering with public telecommunications at Gray Butte and causing irreparable harm to Plaintiff, other users and operators, and the public.

CLAIMS FOR RELIEF

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COUNT II

27.

Defendants' decisions of November 19, 1992 and May 4, 1993, constitute major federal action significantly affecting the quality of the human environment under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.* and 40 C.F.R. § 1508.

28.

Both the EA and supplemental EA which Defendants did prepare are inadequate under the requirements of 40 C.F.R. § 1508.9. Defendants have failed to support their actions with an adequate consideration of reasonable alternatives and adequate determination, record, and decision document establishing that those actions will not, separately or collectively, constitute a major federal action having a significant impact on the human environment.

29.

Defendants' inadequate EAs violate NEPA and 40 C.F.R. 1501-1508 and are thus subject to judicial review under 5 U.S.C. §§ 702, 706(2)(D).

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

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3. Declare that Defendants' decisions of November 19, 1992, and May 4, 1993, violate NEPA and 40 C.F.R. §§ 1501-1508.

4. Declare that Defendants' actions as set forth above are not in accordance with law, contrary to 5 U.S.C. § 706(2)(A).

5. Declare that Defendants' actions as set forth above are not in compliance with procedures required by law, contrary to 5 U.S.C. § 706(2)(D).

6. Issue a preliminary injunction as well as a permanent injunction, ordering defendant to rescind the Special Use Permit it issued to Slater Communications, withdraw its November 19, 1992, and May 4, 1993, decisions, and prohibiting Defendant Slater Communications, Inc., from operating or relocating, unless and until defendant complies with 16 U.S.C. § 497(c), 36 C.F.R. §§251.54-.56, FSM 2728.8 I.D. No. 68, and NEPA, as described herein.

7. Award Plaintiff its reasonable fees, costs, expenses, and disbursements associated with this litigation.

8. Grant Plaintiff such other relief as the Court may deem just and proper.

Dated May 10, 1993.

/s/ Allen L. Johnson, OSB #73153